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December 17, 1999

BY HAND

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Application by New York Telephone Company for Authorization to Provide In-Region, InterLATA Services in New York; CC Docket No. 99-295

Dear Ms. Salas:

CTSI, Inc. ("CTSI") and RCN Telecom Services, Inc. ("RCN") submit the instant *ex parte* letter pursuant to the Commission's *Public Notice, Ex Parte Letter Filed in Connection with Bell Atlantic's Section 271 Application for New York, DA 99-2779* (rel. December 10, 1999).

CTSI and RCN do not believe that Bell Atlantic's eleventh-hour proposal to form a separate subsidiary for Advanced Services in New York will cure the defects in its application. The Commission cannot treat Bell Atlantic's proposal as evidence of compliance with Competitive Checklist Item Four (provisioning of local loops). Bell Atlantic's proposal is merely a promise of future behavior that may or may not comply with the Checklist.¹ Indeed, given that the Commission has little or no experience with the SBC-Ameritech affiliate, upon which Bell Atlantic bases its proposal, it is much too early to determine whether adopting a separate affiliate will result in CLECs receiving nondiscriminatory treatment from the relevant incumbent LEC.

The actual evidence in the record indicates that Bell Atlantic provides deficient service to

¹ See Department of Justice Evaluation, at 43.

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CLECs requesting loops and related services in order to offer Advanced Services.² The Department of Justice, acting in its statutory role of providing advice to the Commission, cited Bell Atlantic's poor performance in this area as sufficient grounds to deny the application. Indeed, the fact that Bell Atlantic is offering this proposal at such a late date is tantamount to an admission that its performance in providing these loops and services has been substandard.

It would set a terrible precedent to allow Bell Atlantic to cure such defects in its application by making promises of future actions. The Commission will hear many other Section 271 applications from around the country over the next few years. If the Commission effectively exempts Bell Atlantic from the Competitive Checklist, it will lack a principled basis upon which to deny similar exemptions in the future. There is no reason to undermine the application process on a going-forward basis just for Bell Atlantic's sake.

In addition, it is completely inappropriate for Bell Atlantic to rely upon the SBC-Ameritech separate affiliate in the context of a Section 271 application. To approve a merger, the Commission must only find that it is in the public interest. Congress heightened the standard for approving a Section 271 application by specifically directing the Commission to apply a Competitive Checklist in addition to a public interest analysis. Conditions imposed in the context of a merger approval simply are not sufficient, by themselves, also to justify approval of a Section 271 application. When the Commission adopted the SBC-Ameritech separate affiliate, it stated that: "[t]he [SBC-Ameritech] conditions are designed to address potential public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services market."³

The SBC-Ameritech separate affiliate is particularly weak and therefore unsuited to correct the discriminatory conduct of which commenters have complained in this proceeding. The SBC-Ameritech separate affiliate allows the parent and affiliate to market services jointly, use the same customer care functions, locate personnel in the same buildings and on the same floors, and engage in exclusive line sharing arrangements.⁴ Indeed, it is not surprising that the SBC-Ameritech separate affiliate explicitly does not comply with Section 272 of the Act, which would be the most appropriate guidelines for a separate affiliate designed to mitigate competitive

² See, e.g., *id.*, at 26; NorthPoint Comments, 10, 13, 15, 18; Rhythms Comments, at 21-22; *id.* (Geis/Williams Affidavit, at ¶¶ 38-39); Covad Comments, at 15-16; NAS Comments, at 7-8; Prism Comments, at 8-10.

³ *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279, at ¶ 357 (rel. October 8, 1999) (emphasis added) ("*SBC-Ameritech Order*").

⁴ *Id.*, at ¶ 365.

harms associated with approval of a Section 271 application.⁵ Moreover, there is no effective enforcement mechanism, short of suspension or revocation of Section 271 authority, to ensure that Bell Atlantic abides by its separate affiliate commitment.

The Commission should reject Bell Atlantic's proposal for a separate affiliate and find that Bell Atlantic has failed to satisfy Competitive Checklist Item Four.

Sincerely,



Antony Richard Petrilla

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Services, Inc.

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⁵ See *id.*, at ¶¶ 364-65.